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UNITED STATES BANKRUPTCY COURT

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Case No. 02-13533

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**In the Matter of:**

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WORLDCOM, INC., ET AL.,

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**Debtor.**

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## One BOWLING Green

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NEW YORK, NEW YORK

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April 25, 2006

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11:09 A.M.

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## B E F O R E:

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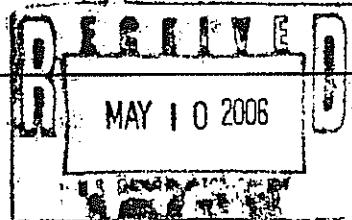
HON. ARTHUR J. GONZALEZ

23

**U. S. BANKRUPTCY JUDGE**

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MOTION by Defendant for Summary Judgment.

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Opposition by Plaintiff Filed.

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MOTION by Debtors for Summary Judgment With

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Respect to Claims Filed by HSG/ATN, Inc.

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Opposition by HSG/ATN, Inc. Filed.

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Transcribed By: Esther Accardi

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1 A P P E A R A N C E S :

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3 MORGENSTERN JACOBS & BLUE, LLC

4 Attorneys for HSG/ATN, Inc.

5 885 Third Avenue

6 New York, New York 10032

7

8 BY: ERIC B. FISHER, ESQ.

9

10 STINSON MORRISON HECKER, LLP

11 Attorneys for MCI

12 1150 18th Street, N.W.

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14

15 BY: MICHAEL E. TUCCI, ESQ.

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1                   P R O C E E D I N G S

2                   THE COURT: Please be seated. All  
3 right. State your names for the record,  
4 please.

5                   MR. FISHER: Eric Fisher from  
6 Morgenstern Jacobs & Blue, for HSG/ATN, Inc.

7                   MR. TUCCI: Michael Tucci on behalf  
8 of MCI.

9                   THE COURT: This is the debtor's  
10 motion, I believe.

11                  MR. TUCCI: There are two motions,  
12 Your Honor. There's a motion of HSG for  
13 summary judgment with respect to the adversary  
14 proceeding. There's also the debtor's motion  
15 for summary judgment with respect to HSG's  
16 claim. We believe both will take,  
17 approximately, a half an hour each and that's  
18 why they're on the docket for an hour this  
19 morning. Counsel had previously conferred and  
20 discussed since HSG had filed first that it  
21 would go first.

22                  THE COURT: All right.

23                  MR. FISHER: Good morning, Your  
24 Honor. Just one minute of background about  
25 HSG. HSG was an agent for WorldCom. They

1 sold WorldCom services and were paid a  
2 commission based on revenue that WorldCom  
3 earned due to customers that HSG brought to  
4 WorldCom. And WorldCom has earned, and  
5 continues to earn, substantial revenues post-  
6 petition from customers that HSG brought to  
7 WorldCom. For example, and this is an exhibit  
8 to my declaration, Exhibit E, WorldCom's  
9 expert has stated that just in the first half  
10 of 2005, WorldCom has earned more than two  
11 million dollars from revenue that -- customers  
12 that HSG brought to WorldCom. We've been  
13 involved in litigation surrounding HSG's claim  
14 against WorldCom since, at least, February  
15 2003. And yet, somehow, it wasn't until  
16 November 11, 2005, that WorldCom brought an  
17 adversary proceeding against my client seeking  
18 the return of a portion of payments that were  
19 made back at the end of 2002. We promptly  
20 filed an answer to that new adversary  
21 proceeding and then we promptly brought on  
22 this motion for summary judgment. The claims  
23 in the adversary proceeding are untimely and  
24 they're legally deficient for other reasons  
25 that I'll try to highlight very briefly.

1 First, in terms of the untimeliness of the  
2 claim, the heart of the matter really is  
3 WorldCom's claim for a return of approximately  
4 455,000 dollars in commissions that were paid  
5 to my client in three trounces. The last  
6 payment was made on November 12, 2002. They  
7 bring this claim under section 549. Under  
8 549(d)(1), the applicable statute of  
9 limitations for this claim would be two years.  
10 So it would have expired in November, 2004.  
11 So, that makes that claim approximately one  
12 year too late. And I think that the lateness  
13 of the claim is compounded by the fact that --  
14 perhaps Your Honor will remember, I was not  
15 counsel at the time, but my clients initially  
16 brought a motion seeking to have their  
17 continuing residual commissions recognized as  
18 an administrative claim. And there were two  
19 days of hearings with regard to that motion.  
20 That motion of my clients was denied by Your  
21 Honor, they were not entitled to  
22 administrative claim priority and my clients  
23 never appealed that decision. In connection  
24 with Your Honor's decision, you issued an  
25 order dated May 11, 2004, and the order, of

1 course, appears as an exhibit to our papers.  
2 And in that order, among other things, Your  
3 Honor directed "order that to the extent the  
4 debtors seek return of the inadvertent post-  
5 petition payments, pursuant to section 549 of  
6 the Bankruptcy Code, the debtors are directed  
7 to initiate an adversary proceeding pursuant  
8 to the Federal Rules of Bankruptcy Procedure."  
9 So, nearly six months before the statute of  
10 limitations expired, Your Honor directed the  
11 debtors to file an adversary proceeding if  
12 they wanted these payments back. I think that  
13 that makes it all the more compelling that  
14 there's just no excuse at all for one year  
15 delay. WorldCom's only argument, really, in  
16 opposition to our argument that the 549 claim  
17 is untimely is that they did raise this issue  
18 of the 455,000 dollars in post-petition  
19 payments in their objection to our motion for  
20 an administrative claim. I think that this  
21 argument really fails miserably for a number  
22 of reasons. First, they overlooked the fact  
23 that Your Honor specifically directed them to  
24 commence an adversary proceeding. And so,  
25 Your Honor put them on notice that their

1 objection to -- that was contained in their  
2 motion was just not enough. There's also no  
3 question here that my clients have been  
4 prejudiced by this very significant delay. In  
5 the record, you will find that we've attached  
6 certain correspondence indicating, for  
7 example, and I don't believe that WorldCom's  
8 counsel will dispute this, the key witnesses  
9 here are individuals by the name of Ahern,  
10 Hampton, Lako, and Kirk Reynolds. We've been  
11 trying to get their documents from WorldCom.  
12 WorldCom has had a very difficult time  
13 retrieving their files due to the passage of  
14 time. In particular, they have not been able  
15 to retrieve their electronic files. Most  
16 recently, they told us that it would cost  
17 approximately 300,000 dollars to retrieve  
18 those files and they've told us that they're  
19 not going to produce the files unless we share  
20 in the costs of getting those files. So,  
21 there's no question here that the passage of  
22 time has caused evidence to be, essentially,  
23 unreachable. It's made the cost of litigation  
24 potentially prohibitive. And I think that  
25 that highlights why, not only strictly by the

1 terms of the statue is the claim late, but it  
2 also would be very unfair to allow this  
3 particular adversary proceeding to proceed. I  
4 now want to just turn, briefly, to another set  
5 of claims that WorldCom asserts in their  
6 adversary proceeding. They have claims for  
7 tortious interference with WorldCom's  
8 contracts. In connection with the claim  
9 proceeding, WorldCom contended that my clients  
10 solicited certain customers of WorldCom. And  
11 Your Honor made certain findings that, in  
12 fact, there were a number of instances of  
13 solicitation. WorldCom is now suing my client  
14 for tortious interference with contract for  
15 solicitation that they allege occurred back in  
16 2002. As Your Honor will hear when we argue  
17 the second motion that is before Your Honor,  
18 there is a claim objection proceeding that has  
19 been out there for a long time now. At the  
20 heart of the claim objection proceeding,  
21 WorldCom's objection to our claim is that  
22 because we solicited, we've breached the  
23 contract. And because we've breached the  
24 contract, we have to forfeit all the residual  
25 commissions that were otherwise owed. And, I

1 should point out that those residual  
2 commissions, according to their expert, are  
3 approximately 5.4 million dollars in residual  
4 commissions that we're being asked to forfeit.  
5 But, in any event, that issue is front and  
6 center independent claim objection proceeding.  
7 The claim objection proceeding, in effect, is  
8 about breach of contract. And what WorldCom  
9 is doing here now is they're bootstrapping.  
10 This tortious interference with contract  
11 claim, it just alleges that we solicited. And  
12 so as a result, WorldCom is entitled to  
13 damages. Well, that's exactly what's already  
14 at issue in the claim objection proceeding.  
15 If WorldCom prevails then we lose significant  
16 commissions because of alleged breach of  
17 contract. And there's well established law  
18 that, of course, you cannot bring a tort claim  
19 for a claim that is essentially a breach of  
20 contract claim.

21 THE COURT: Explain the damage to  
22 the relationship. If they breached the  
23 contract -- if there was a breach of contract,  
24 which is the issue in the claims objection,  
25 and then you have to return commissions

1 received. And at the same time that conduct  
2 interfered with WorldCom's relationship with  
3 customers and therefore they lost -- they  
4 could establish damages from that  
5 interference, why wouldn't they be cumulative?  
6 You seem to be arguing that they're one and  
7 the same damage.

8 MR. FISHER: The contract prohibits  
9 a certain kind of solicitation by my client.  
10 WorldCom alleges that that nonsolicitation  
11 provision was breached by my client. The  
12 contract then spells out what damages that  
13 WorldCom's entitled to in the event of such a  
14 breach. When we get to the other motion, I'll  
15 tell you why they're not entitled to those  
16 damages. But what the contract spells out is  
17 the damages that they're entitled to, by the  
18 terms of the contract, are commissions that  
19 have been earned due to revenue generated by  
20 WorldCom. All of those commissions are  
21 forfeited. So the contract spells out the  
22 damages for breach and that's essentially all  
23 they're entitled to and the contract spells  
24 out the damages. So that's why I think that  
25 these tort claims are entirely duplicative.

1 And I think that, when you consider what's  
2 happening here, I think what's really going on  
3 here is that this is a case of WorldCom making  
4 it very, very difficult for what is a  
5 relatively small family business to litigate  
6 what I consider to be an extremely valid claim  
7 against WorldCom by -- in late 2005 greatly  
8 multiplying the litigation in circumstances  
9 where we can't even reasonably proceed with  
10 discovery. We also -- with respect to the  
11 solicitation that forms the basis for  
12 WorldCom's tortious interference with contract  
13 claim, one of the alleged acts -- there are  
14 two alleged acts of solicitation. One of  
15 those alleged acts is clearly outside of the  
16 statute of limitations for tortious  
17 interference with contract. The statute of  
18 limitations is three years and the alleged act  
19 of solicitation occurred on September 25,  
20 2002. So that particular act of solicitation  
21 is time barred. WorldCom can't seek to  
22 recover for that. Finally, WorldCom also has  
23 brought account for a violation of the  
24 automatic stay. This is, again, this is all  
25 cumulative. What's the violation of the

1 automatic stay, that we allegedly solicited  
2 their customers and that their customers were  
3 allegedly property of the estate. It's  
4 entirely cumulative of a tort claim. But, in  
5 any event, there's well established second  
6 circuit law that a corporate debtor, such as  
7 WorldCom, cannot bring a claim under 362(h).  
8 That claim is limited to individuals. So what  
9 does WorldCom say in response? They say,  
10 well, effectively construe it as a claim for  
11 contempt. And the Court, in its equitable  
12 powers can hear a contempt claim, but they  
13 haven't brought a contempt claim, they haven't  
14 amended their complaint to bring a contempt  
15 claim. And the reason they haven't is because  
16 they know they can't meet threshold for a  
17 contempt claim. So, the 362(h) claim for  
18 violation of the stay should be dismissed as  
19 well. Also on the 362(h) claim, I'm not sure  
20 whether Your Honor wants me to get into this,  
21 it's briefed in the papers. We also think the  
22 362(h) claim fails because the customers were  
23 not property of the estate. And if Your Honor  
24 wishes, I can go into that. But otherwise,  
25 perhaps I should reserve some time for a

1 reply.

2 THE COURT: You can address whatever  
3 you need to in reply. The debtor.

4 MR. TUCCI: Thank you, Your Honor.

5 I will briefly address each of the points  
6 raised by counsel for HSG. As the Court's  
7 fully aware, exact language of section  
8 549(d) (1) or (d) in subsection 1 is "an action  
9 or proceeding under this section may not be  
10 commenced after the earlier of two days." We  
11 will admit that an action was not instituted  
12 within the two years, however, proceedings  
13 were. When HSG filed its claim --

14 THE COURT: Well, what did my order  
15 tell you to do?

16 MR. TUCCI: It told us to file an  
17 adversary proceeding. That is correct.  
18 Which, under the Farmland case, which we have  
19 cited to Your Honor, would take the objection  
20 coupled with a request for payment. And once  
21 the adversary proceeding was filed, the time  
22 period or the time with which we would judge  
23 whether it was barred or not would be the time  
24 that the request was made for the payment.  
25 And we believe that the Farmland case is

1 correctly decided and that the time should  
2 relate back to the original request, not the  
3 date upon which the adversary proceeding was  
4 filed.

5 THE COURT: Is there any explanation  
6 as to what took you so long to file the  
7 adversary proceeding or you just think that's  
8 irrelevant?

9 MR. TUCCI: I do not know the answer  
10 to that question, Your Honor, why it took that  
11 long to file the adversary proceeding. Now,  
12 with respect to prejudice, there is absolutely  
13 no prejudice. The witnesses that Mr. Fisher  
14 speaks of have absolutely nothing to do with  
15 the issue related to the post-petition  
16 transfer. The monies that are sought to be  
17 returned to the estate are funds that were  
18 paid post-petition with respect to the claim  
19 for continuing commissions. Once Your Honor  
20 ruled that they weren't entitled to  
21 administrative priority they were a classics  
22 claim. That's as a matter of law. These  
23 people have absolutely nothing to say about  
24 that. That would change the classification of  
25 those payments. They were paid 100 cents on

1 the dollar in post-petition monies and they  
2 should have been paid, if at all, which we'll  
3 get to here in a minute as a classics claim.  
4 There is no prejudice. HSG has known since  
5 March of 2003, when the objection to the claim  
6 for administrative priority was filed, that  
7 the debtors sought the return of those funds.  
8 With respect to the tort claims, it is useful  
9 to actually read what the debtor said in the  
10 adversary proceeding. In -- and, by the way,  
11 Your Honor, there are three tort claims here,  
12 not just one. There is tortious interference  
13 with customer contracts, tortious interference  
14 with business relationships and tortious  
15 interference with agency contracts. In the  
16 prayer for relief under each count the debtor  
17 stated, "because of HSG's tortious  
18 interference, reorganized debtor's request  
19 relief for any compensatory damages not  
20 remedied under section 8.3 of the agreement."  
21 It's not duplicative. It's if there are  
22 damages over and above the contractual damages  
23 then the tort claim would be used to obtain  
24 compensatory damages.

25 THE COURT: What are the rights to

1 get any damages even if you could assert them  
2 over and above what the contract provides?

3 MR. TUCCI: Well, that leads me to  
4 my next point. The debtor has not asserted  
5 any breach of contract claim, there is no  
6 breach of contract claim asserted by the  
7 debtor. What this is, is a claim by HSG for  
8 the residual commissions that's been defended  
9 by the debtor with the assertion that a  
10 condition to that payment has not been  
11 satisfied. It is not an affirmative claim by  
12 the debtor that HSG breached the contract.  
13 The contract, and I'll be happy to get into  
14 this now, but we'll probably get into it in  
15 more detail on the debtor's motion, the  
16 contract says, "if you engage in this  
17 particular type of conduct, you are not  
18 entitled to any further residual commission."  
19 HSG engaged in that conduct. Therefore,  
20 they're not entitled to any further  
21 commission, it's a condition. Your Honor even  
22 found in the administrative priority decision  
23 that this was a condition subsequent which  
24 might provide the debtor a defense to payment,  
25 that's a paraphrasing of what Your Honor

1 found. It's not a breach of contract claim,  
2 we've not made an allegation that it's a  
3 breach of contract claim. With respect to the  
4 statute of limitations, again, there are three  
5 tort claims here. HSG has alleged the statute  
6 has run with respect to only one, it's a  
7 contact with a customer so it would only apply  
8 to one count not all three tort counts, number  
9 one. Number two, under New York law, the  
10 cause of action does not accrue until the  
11 damages have been sustained by the debtor.  
12 There's no allegation as to when the damages  
13 have been sustained, the burden is on HSG and  
14 the motion for summary judgment to establish  
15 that there's no genuine issue with respect to  
16 any material fact that the cause of action  
17 accrued outside the limitations period.  
18 Without an allegation of when the damages --  
19 that the damages occurred prior to or outside  
20 the statute of limitations period, the motion  
21 for summary judgment cannot be granted. And  
22 finally, with respect to the 362, there again,  
23 looking at the actual language of the  
24 adversary complaint -- adversary proceeding  
25 complaint, 362(h) does not appear anywhere in

1 the count. The claim was not that the debtor  
2 was entitled to damages under 362(h), the  
3 claim was that because of the willful,  
4 malicious and intentional violation of the  
5 automatic stay, HSG has been damaged and that  
6 the debtors requested relief for any, again,  
7 compensatory damages not remedied under  
8 section 8.3 of the agreement. It's not a  
9 claim under 362(h). Finally, with respect to  
10 whether the customers are property of the  
11 estate, we've cited, Your Honor, to Judge  
12 Brosman's opinion in Alert Holdings which  
13 shows, in virtually identical circumstances,  
14 that customers in this type of situation where  
15 there's a proscription on contacting those  
16 customers are property of the estate. And a  
17 violation of that proscription can be remedied  
18 by the Court as a violation of the automatic  
19 stay. We think that the entire motion should  
20 be denied for the reasons stated.

21 THE COURT: All right. Thank you.

22 MR. FISHER: Your Honor, if I can  
23 briefly reply to those points. Mr. Tucci says  
24 that it's not -- the claim is not time barred  
25 because there was a proceeding that was

1 commenced within the statute of limitations  
2 period, and he's referring to the objection to  
3 our motion for administrative claim. None of  
4 the cases, including Farmland, that the debtor  
5 cite in their paper relate in any way to  
6 construing 549(d). They're dealing generally  
7 with the meaning of proceeding. And here I  
8 think the circumstances are quite unique  
9 because Your Honor specifically directed that  
10 the proceeding that was pending was just not  
11 enough, they had to commence an adversary  
12 proceeding. And due to their delay, as I've  
13 indicated, there has been substantial  
14 prejudice. Now, if Mr. Tucci says there  
15 hasn't been prejudice because the documents  
16 from these witnesses are not relevant and the  
17 witnesses themselves are not relevant, that's  
18 absolutely not the case. What we intend to  
19 show, and this will perhaps come out more  
20 clearly when we argue the second motion, is  
21 that what happened here is that WorldCom  
22 decided to reject the residual commission  
23 obligation in a motion that it brought on  
24 January 3, 2003. And up until that point, it  
25 did what it was supposed to do, at least

1 through the November 15th payment, which is it  
2 honored the contract. And those payments that  
3 were made in full were appropriately made to  
4 our client. And if WorldCom is now denying  
5 that that's what happened then we're entitled  
6 to get the decision makers who are  
7 specifically -- WorldCom had an internal  
8 debate, what should we do, we learned that HSG  
9 engaged in this act of solicitation, should we  
10 terminate the residual commission obligation,  
11 we seem to have that right under the contract,  
12 or should we let it go. And they decided to  
13 let it go and they didn't reject the contract  
14 until January 3, 2003. When we get to the  
15 other motion I can explain why I think it is  
16 that they decided to do that. But in any  
17 event, we're entitled to testimony of the  
18 witnesses who were involved in that decision  
19 to show that's what really happened. Mr.  
20 Tucci says there's no affirmative claims for  
21 breach, there certainly is an affirmative  
22 claim for breach in the objection to our  
23 claim. Paragraph 24, for example, but there  
24 are many other instances. The claim says --  
25 the objection to claim says, "WorldCom

1 provided notice to HSG of its breach." And  
2 then proceeds to explain why, under the  
3 contract, they don't have any further  
4 commission obligation that's a claim for  
5 breach. It may not have been asserted as an  
6 adversary proceeding, but the breach of  
7 contract issue is there front and center. I  
8 disagree with Mr. Tucci's reading of the  
9 contract, we'll get to that on the other  
10 motion. Mr. Tucci says, on the topic of  
11 damages, he says that with regard to the  
12 September 25, 2002 solicitation, that's not  
13 time barred. Because there's no evidence in  
14 the record as to when WorldCom sustained  
15 damages as a result of that solicitation and  
16 that's when the statute of limitations should  
17 begin to accrue. Well, in connection with the  
18 claim proceeding, on July 1, WorldCom's  
19 witness testified that with respect to both  
20 episodes of solicitation that are potentially  
21 at issue here, there was no discernible change  
22 at all in WorldCom's revenue stream from what  
23 it could perceive. So there are no damages,  
24 that is a complete red herring. If there are  
25 damages, WorldCom knows what they are and when

1       they were accrued. So really it should be  
2       WorldCom who's telling you, here's when the  
3       damages accrued and that's why the claim is  
4       timely. They're not telling you that, they're  
5       just saying there's nothing in the record  
6       about damages. But there is from the claim  
7       proceeding.

8                   THE COURT: Let's proceed to the  
9       next motion.

10          MR. TUCCI: Thank you, Your Honor.  
11       This is WorldCom's motion and bear with me, I  
12       am going to go a little bit farther into the  
13       facts here because they're important to  
14       understanding the debtor's motion for summary  
15       judgment. The agreement at issue here was an  
16       agreement whereby HSG obtained customers,  
17       telecom services customers for WorldCom. Then  
18       was paid a commission on a continuing basis to  
19       do that. The parties entered into this  
20       contract approximately four years prior to the  
21       bankruptcy filing. And front and center in  
22       the contract, in at least three places, there  
23       is an express prohibition on HSG soliciting  
24       the customers if procured for WorldCom. And  
25       there were specific consequences for that

1 solicitation. Under paragraph 8.1 of the  
2 agreement, "for as long as WorldCom pays  
3 representative commissions in accordance with  
4 Exhibit B, representative agrees," that's HSG,  
5 "that representative will not contact any  
6 customers for the purpose of inducing them to  
7 switch to another provider or any service  
8 which competes with the services of defined  
9 term." 8.3 under the agreement,  
10 "representative agrees that if representative  
11 does so contact a customer -- a WorldCom group  
12 customer, WorldCom will give representative  
13 five days prior written notice at the end of  
14 which period WorldCom's obligation to pay  
15 representative any commissions not yet earned  
16 under this agreement will cease." Now, HSG  
17 became somewhat nervous, apparently, when it  
18 read reports that WorldCom was contemplating a  
19 bankruptcy, a reorganization. And about a  
20 month before that it sent a letter, which it  
21 was entitled to do under the agreement,  
22 terminating the agreement. What that allowed  
23 HSG to do was no longer be an exclusive seller  
24 of WorldCom services, it could out and market  
25 other telecom service providers to other

1 customers because, obviously, we had the  
2 prohibition on contacting these customers. So  
3 it sent a letter to MCI WorldCom and on August  
4 6th, MCI WorldCom responded stating that they  
5 have accepted the termination effective as of  
6 July 28th, 2002, which was 30 days after the  
7 notice was sent. And then it followed, "this  
8 letter is a reminder that during this post-  
9 termination period ATN", which is another name  
10 for HSG, "is required to comply with the  
11 provisions of section 8.1 and section 13 of  
12 the agreement." And it went on to say, "that  
13 ATN is required not to contact any MCI  
14 WorldCom or TTI customers procured under the  
15 agreement or under any other agreement between  
16 ATN and WorldCom for the purposes of inducing  
17 such customers to switch to another provider  
18 of similar services." Approximately a month  
19 later, ATN sends a letter to one of its  
20 customers saying "as you know, ATN's been  
21 taking care of your phone services since June  
22 because of the uncertain future of TTI  
23 National which is wholly owned by bankrupt  
24 WorldCom. We would like to switch your  
25 account to another provider that we are now,"

1 I can't read it, it's a bad fax, "utilizing,"  
2 I believe. "We strongly recommend your  
3 allowing us to transition your account to DNG.  
4 You will save about five percent over TTI, but  
5 the bigger concern is that TTI WorldCom may  
6 not survive the bankruptcy. There could be  
7 service disruptions and other problems. DNG  
8 would accept your account without additional  
9 credit checks." That was in September, a  
10 month after MCI WorldCom warned HSG not to  
11 solicit any of its customers. WorldCom found  
12 out about that and wrote, on November 14th, to  
13 HSG. The beginning sentence of the letter is  
14 "With this letter, MCI WorldCom  
15 Communications, successor in interest to  
16 WorldCom Technologies, gives notice to HSG/ATN  
17 that ATN has acted in violation of section 8.1  
18 of the representation agreement dated August  
19 4, 1998." What was HSG's response to that?  
20 Their response was to engage in a massive  
21 solicitation campaign involving 152,000  
22 WorldCom customers that they had procured on  
23 behalf of WorldCom and so solicit them to  
24 switch service providers. WorldCom had  
25 already notified HSG that it was in violation

1 of the agreement. When it found out about the  
2 152,000 what did it do? Its counsel, at that  
3 time Weil Gotshal, sent a letter saying  
4 "you're in violation of the automatic stay,  
5 these customers are property of the estate,  
6 stop it right now." What did HSG do, this is  
7 somewhat of an aside, Your Honor, but once  
8 they got that letter they switched from  
9 soliciting the customers to soliciting the  
10 agents. And then January and February of  
11 2003, they solicited approximately 14,000  
12 agents of MCI, which was also prohibited under  
13 the terms of the agreement. MCI told HSG, at  
14 this time, it was no longer getting any money  
15 from MCI, which it had been paying all of the  
16 post-petition amounts that we were talking  
17 about under the 549 claim up to that point.  
18 It told them it was going to reject the  
19 contract and it told them it was in violation  
20 of the automatic stay. None of that is in  
21 dispute. All of that happened, there's not a  
22 scintilla of evidence before this Court that  
23 that is factually inaccurate. The only issue  
24 is what effect does that conduct have. Under  
25 the express terms of the agreement, WorldCom's

1 obligation to pay the future commissions  
2 ceased. There is no dispute that that's what  
3 the agreement says. So we have no genuine  
4 issue of any material fact with respect to the  
5 facts of solicitation or what the agreement  
6 says about solicitation. HSG throws up  
7 several arguments to try and get out of this  
8 summary judgment, is basically where we are.  
9 The first argument they said well, the notice  
10 on November 14th wasn't good enough because it  
11 happened with respect to the September  
12 solicitation not the other 152,000  
13 solicitations. Well, that's just absurd.  
14 There was no requirement to renotify them.  
15 The solicitation occurring was a violation of  
16 the agreement, HSG was notified of the  
17 violation of the agreement; five days  
18 thereafter WorldCom's obligation to pay  
19 ceased. In effect, HSG had a choice. And to  
20 kind of paraphrase Yogi Berra, they went to  
21 the fork in the road and they took it. They  
22 could have gone to the left side which was  
23 leave the MCI customers alone and continue  
24 collecting the residual commissions, or they  
25 could go the right side and solicit the MCI

1 customers and forego the commissions. They  
2 are trying to do both. They solicited 100 --  
3 at least 152,001 customers and they're trying  
4 to collect the commissions at the same time.  
5 Because they're saying, if I'm understanding  
6 Mr. Fisher correctly, well, it wasn't very  
7 successful solicitation so we shouldn't have  
8 to forego, we shouldn't have to live up to the  
9 terms of the contract. Now, in its brief HSG  
10 has said WorldCom is judicially estopped from  
11 making this argument because it didn't make  
12 this argument when it defended the  
13 administrative priority. Judicial estoppel  
14 simply does not apply in this instance. And  
15 the reason it doesn't apply is because  
16 WorldCom took no position with respect to  
17 whether the commissions were ultimately owed  
18 in the administrative proceeding. All it did  
19 was defend the administrative proceeding under  
20 503. It didn't engage in a discussion at that  
21 time nor would it have been appropriate to,  
22 that the claim was in of itself improper. As  
23 a matter of fact, HSG hadn't even filed a  
24 claim at that point in time, it filed a claim  
25 in November -- excuse me, in October, I

1 believe it was of 2004. It's also said well,  
2 wait a minute, you can't give us -- you can't  
3 give WorldCom summary judgment because we  
4 haven't had an opportunity to engage in  
5 discovery. So it's raised this Rule 56(f)  
6 defense that it should be either denied or  
7 delayed, the summary judgment. And to that,  
8 and we say this in our papers, in order to  
9 prevail on this type of 56(f) defense, if you  
10 will, you have to come forward and say what  
11 those facts are and why they would have  
12 mattered. As I stated earlier, here we have  
13 undisputed facts of solicitation and an  
14 undisputed consequence of that solicitation  
15 under the terms of the agreement. There  
16 aren't any facts that are out there that shed  
17 light on that. It's an unambiguous  
18 solicitation and it's an unambiguous  
19 agreement. The agreement speaks for itself.  
20 And the sort of final group of defenses that  
21 HSG raises are related to enforceability of  
22 the agreement. Well, number one, when they  
23 answered the adversary proceeding and all this  
24 is laid out in the adversary proceeding and  
25 the objection to the amended claim, they never

1 once said that the agreement was  
2 unenforceable, and it's an affirmative  
3 defense. So they waived it, number one.  
4 Number two, they don't come forward. The  
5 burden is on them to come forward with facts  
6 showing that the agreement is either void,  
7 violates public policy or is unconscionable.  
8 And as we set forth in the brief, agreements  
9 just like this are routinely upheld,  
10 especially under the employee choice doctrine,  
11 which is -- there are many decisions under the  
12 employee choice doctrine in the Second Circuit  
13 which, quite frankly, recognize the choice  
14 that HSG had to make here. Continue  
15 collecting the commissions and respect the  
16 terms of the agreement or forego the  
17 commissions and violate the agreement. An  
18 entity -- a sophisticated entity such as HSG  
19 or a sophisticated employee is viewed as  
20 making an intelligent choice when faced with  
21 that type of situation. And for all those  
22 reasons, Your Honor, we believe that summary  
23 judgment on this claim should be granted  
24 denying it.

25 MR. FISHER: Your Honor, I'd like to

1 really just go to the heart of the matter.  
2 And I think the heart of the matter is did the  
3 letter that WorldCom sent on November 14,  
4 2002, after they learned of this September 25,  
5 2002 single incident of solicitation, did that  
6 cut off their obligation to pay residual  
7 commissions. And I think that it is very  
8 clear that it did not. At a minimum, there  
9 are very serious factual issues here that need  
10 to be explored before one conclusion can be  
11 made one way or the other. And I want to  
12 highlight, again, that there have been no --  
13 despite the fact that I sent deposition  
14 notices in October and November, despite the  
15 fact that I put document requests out there in  
16 August and have been pressing for documents  
17 and depositions ever since, we haven't gotten  
18 the discovery that we're entitled to. But  
19 going right to the heart of the matter, the  
20 November 14, 2002 letter, Mr. Tucci read to  
21 you the first part of it, but it concludes by  
22 saying, one, "ATN should immediately cease  
23 sending letters to or contacting in any way  
24 any MCI WorldCom or TTI National customers  
25 procured under the agreement." If section

1       8.1, which is the non-solicitation provision,  
2       if WorldCom was terminating its residual  
3       commission obligation, then ATN was no longer  
4       prohibited from soliciting. What WorldCom did  
5       is they decided, notwithstanding the fact that  
6       they had learned of the solicitation, they  
7       didn't want to let HSG off of the hook. They  
8       wanted to maintain the ability to keep HSG  
9       from soliciting. And, so as a result, they  
10      continued to pay residual commissions. That  
11      was under the circumstances of the time when  
12      WorldCom was dealing with a whole mess from  
13      their agents, a strategic choice. Actually,  
14      their counsel referred to it as business  
15      judgment when he made closing argument in the  
16      administrative claim proceeding. They then  
17      say "MCI WorldCom is considering what steps to  
18      take to protect MCI WorldCom's rights  
19      including, but not limited to, ceasing payment  
20      to ATN of any commissions not yet earned under  
21      the agreement pursuant to section 8.3 of the  
22      agreement." So, obviously, I concede that  
23      this is an authentic letter and I concede that  
24      Mr. Reynolds of WorldCom told my client that  
25      WorldCom was considering whether to cut off

1 residual commissions, but they ultimately did  
2 not. And I should point out that this letter,  
3 it's signed by Kirk Reynolds, it's cc'd to Mr.  
4 Lako, Mr. Ahern and Mr. Hampton. There are  
5 deposition notices outstanding for all four of  
6 them. There are document requests even the  
7 files of all four of those individuals and we  
8 don't have it yet. Now, I think that there's  
9 more compelling evidence in the record as to  
10 why that November 14th letter is not notice of  
11 termination of the residual commission  
12 obligation. And all this evidence could be  
13 found as exhibits to the Batten declaration  
14 that we submitted in connection with our  
15 opposition. One, a WorldCom witness testified  
16 before Your Honor that, with regard to the  
17 November 14th letter, "rather than separate  
18 this agent," that's the quote they decided not  
19 to separate the agent, WorldCom decided to  
20 send a, "strong reminder, letting them know  
21 that we're aware of the activities." This is  
22 a strong reminder letter. It's not a letter  
23 cutting off commissions. Then WorldCom's  
24 counsel, in closing, argued, Your Honor, it  
25 was a business judgment whether they acted

1 correctly in not terminating the contract or  
2 taking some other avenue. Effectively,  
3 WorldCom's counsel conceded that they decided,  
4 at the time, not to terminate the contract.  
5 That was their business judgment. WorldCom  
6 sends an e-mail on December 17, 2002, to my  
7 client. WorldCom has made a determination to  
8 reject your residual commission obligations.  
9 This is what they say in December 17, 2002.  
10 By then they know of both episodes of  
11 solicitation. "WorldCom has made a  
12 determination to reject your residual  
13 commission obligations as part of its  
14 management of the bankruptcy process. We  
15 regret the impact on your company, but can  
16 assure you that you have the right to file a  
17 claim against the company as part of the  
18 bankruptcy claims process." This was not a  
19 foreign e-mail, this was an e-mail from Mr.  
20 Lako, with whom my client had been dealing  
21 regularly, that begins, dear George. This was  
22 not an oversight. WorldCom had made a  
23 decision to reject. Then on January 3, 2003,  
24 they filed a motion seeking to reject the  
25 contract -- the residual commission

1 obligation. If they're filing a motion to  
2 reject, why are they filing a motion to reject  
3 if it's WorldCom's view that they had already  
4 terminated that obligation due to  
5 solicitation? Plainly, they had not. And I  
6 think that that's really where the heart of  
7 our estoppel argument is. Your Honor granted  
8 the motion to reject. In effect, by bringing  
9 the motion to reject, WorldCom admitted that  
10 as of January 3, 2003, when they made the  
11 motion, the contract was still in existence,  
12 the residual commission obligation was still  
13 in existence. So those are really, I think,  
14 the more salient facts that we rely on to say  
15 that this letter, the November 14, 2002  
16 letter, was not notice of termination. And,  
17 you know, counsel used the expression that  
18 WorldCom came to a fork -- that HSG came to a  
19 fork in the road and that they decided to go  
20 both ways. Well, actually, I think that  
21 that's exactly what WorldCom has done here.  
22 They learned of HSG's solicitation and they  
23 had a decision. Do we terminate residual  
24 commissions, thus freeing up HSG to solicit,  
25 or do we just live with it and send them

1 strong reminder letters because we want to  
2 have the leverage to continue to keep them  
3 from soliciting. And they decided to send the  
4 strong reminder letter, that's a choice that  
5 they made. I do think that one way through  
6 the thicket for Your Honor is simply our 56(f)  
7 argument. We put in a very detailed  
8 declaration specifying exactly what it is that  
9 we're trying to get to the bottom of and  
10 exactly what discovery we've been denied. And  
11 finally, Your Honor, with regard to the  
12 enforceability of this nonsolicitation  
13 provision and the -- really what we're  
14 challenging is -- we're challenging it as an  
15 unenforceable liquidated damages provision  
16 because, what we know here as a matter of  
17 fact, we know that with respect to the two  
18 instances of solicitation, WorldCom's witness  
19 said, and this is highlighted in our brief,  
20 said that there was no change in WorldCom's  
21 revenue stream. So we know that there were no  
22 damages to WorldCom. And we also know, if you  
23 just credit WorldCom's expert report, that if  
24 we're entitled to residual commissions they're  
25 in the amount of 5.4 million dollars. Now, we

1 would be an unsecured creditor, so ultimately,  
2 we would get approximately 30 percent of that.  
3 But it is a very substantial claim and  
4 WorldCom is seeking to have us forfeit all of  
5 it for solicitation that they decided never to  
6 act on and that they concede did not have any  
7 real impact on their revenue stream. So we  
8 think that's what makes it an unenforceable  
9 liquidated damages provision. HSG has been  
10 described as a sophisticated company. My  
11 clients, in certain respects, are  
12 sophisticated. But at the end of the day it's  
13 a father/son company. It is a small company  
14 and I do not think that they had any leverage  
15 whatsoever and if the discovery proceeds we'll  
16 be able to show this. When it came to  
17 negotiating the terms of this representation  
18 agreement, there's a limitation of damages  
19 provision that applies to WorldCom. There's  
20 no limitation of damages that applies to my  
21 client. So WorldCom had enormous leverage  
22 here, they're seeking to have this family  
23 company forfeit a very sizeable commission  
24 based on conduct that WorldCom has conceded  
25 had no impact on their revenue stream, and

1 even more to the point, based on conduct that  
2 WorldCom decided not to act upon and not to  
3 terminate the residual commission obligations  
4 for their own strategic reasons.

5 THE COURT: All right, before you  
6 sit down, let me -- and your point has been  
7 made clear, but let me just try to understand.  
8 If, as you suggest, I believe you suggest,  
9 that WorldCom never terminated the agreement  
10 pursuant to the contract and the only thing  
11 WorldCom, in your view, ultimately did was  
12 reject it, which would then be treated as a  
13 breach of the agreement relieving the other  
14 side from performance under the agreement that  
15 the ability of WorldCom to say that you can't  
16 get, or any of your accrued commissions should  
17 be disallowed, would not be triggered because  
18 there was never a termination. So you're left  
19 with a rejected contract with the damages that  
20 then flow from a rejected contract. What  
21 then, in your view, defenses would WorldCom  
22 have? You're saying that the defense that you  
23 solicited in violation of the contract doesn't  
24 really get them anywhere because their  
25 obligation then was to terminate, and since

1       they didn't terminate that solicitation would  
2       be limited to what, establish damages?

3                    MR. FISHER: Correct, Your Honor.

4                    THE COURT: It would be the only  
5       offset?

6                    MR. FISHER: And that's exactly the  
7       ground where our experts disagree, how do you  
8       cal -- because there's a certain projection  
9       that's involved here. WorldCom, as I  
10      mentioned, continues to earn very substantial  
11      revenue from customers that HSG brought to it.  
12      So our experts disagree about how do you  
13      project into the future when that revenue  
14      stream will ultimately trail off, such that  
15      residual commissions stop accruing. Their  
16      expert comes to a number of 5.4 million and  
17      our expert, depending on which attrition rate  
18      he used, says we need some more discovery but  
19      the claim is between 5.1 million and 9  
20      million. And I think that ultimately that's  
21      where this dispute should be. It should be a  
22      dispute about what are the damages as a result  
23      of the rejection, exactly as Your Honor  
24      indicated.

25                    THE COURT: All right. The debtor.

1                   MR. TUCCI: Very briefly, Your  
2 Honor. There are a couple of facts that we  
3 need to make sure are very straight here.  
4 Number one, the agreement has been terminated.  
5 As you might recall, I read the letter  
6 accepting the termination that was sent by HSG  
7 in the summer of 2002. The agreement was  
8 terminated effective July 28, 2002. All that  
9 remained was the continuing obligation to pay  
10 residual commissions and the continuing  
11 obligation not to solicit the customers and  
12 the agents. That is what was rejected. We  
13 can have an academic discussion on what that  
14 means in the grand scheme of things, but  
15 termination, notice of termination, all of  
16 that is meaningless. The agreement was  
17 terminated. All the agreement required  
18 WorldCom to do was give notice of a violation  
19 of that section 8.1, the nonsolicitation  
20 provision. It gave that notice on November  
21 14, 2002. It was received, it was  
22 unambiguous, it says "hereby gives notice to  
23 HSG/ATN that ATN has acted in violation of  
24 section 8.1." Under the terms of the  
25 agreement, once that notice was given,

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1 WorldCom's obligation to make further residual  
2 commission payments ceased five days after  
3 that. That's it, that's the facts. One other  
4 thing that we need --

5 THE COURT: So what was its conduct  
6 then, thereafter continuing to pay the  
7 residuals?

8 MR. TUCCI: I'm sorry?

9 THE COURT: I mean, how do you  
10 explain this conduct thereafter, when it  
11 continued to pay them?

12 MR. TUCCI: It didn't. Let's get  
13 the dates straight here. It made a payment on  
14 September 15th, that was for the period  
15 petitioned to the end of July. It made a  
16 payment on October 15th that was for August.  
17 It made a payment on November 12th or so, that  
18 was for September. This letter is dated  
19 November 14th, two days later. It never made  
20 another payment after that. It told them it  
21 wasn't making any payments, it rejected the  
22 agreement; it wrote them a letter and said  
23 they were violating the automatic stay.

24 THE COURT: Well, you're merging a  
25 number of events into one particular letter, I

1 think, and one date. On November 14th, what  
2 did -- how do you construe that as a notice of  
3 termination?

4 MR. TUCCI: It's a notice of  
5 violation of section 8.1 of the agreement.  
6 And under 8.3 of the agreement, once the  
7 notice of violation is given, WorldCom's  
8 obligation ceases five days after that.

9 THE COURT: Did the letter infer  
10 that it wasn't then going to pay any more  
11 commissions? I mean, what did the letter say  
12 about commissions?

13 MR. TUCCI: Well, it said it was  
14 considering what steps to take to protect its  
15 rights. And what steps it took was, stop  
16 paying the commissions, noticed that it was  
17 rejecting the contract, sent a letter that HSG  
18 had violated the automatic stay and there is  
19 e-mail correspondence saying we're rejecting  
20 this contract, we're not paying you anymore.

21 THE COURT: What do you need to  
22 reject a terminated contract?

23 MR. TUCCI: Well, it's an  
24 interesting question.

25 THE COURT: Well, it is interesting,

1 but I think the burden may very well lie with  
2 WorldCom to explain.

3 MR. TUCCI: I think at the time, and  
4 again, the dates here are critical, this  
5 letter is dated November 14. This massive  
6 solicitation occurred somewhere from mid-  
7 November to mid-December. And, with  
8 everything that was going on, there were  
9 152,000 solicitations that occurred in this  
10 approximately 30 day period. And one of the  
11 reactions was, let's not pay them anymore,  
12 let's reject the contract. And that's what  
13 happened.

14 THE COURT: If the contract was  
15 terminated, what rights did they have to  
16 solicit thereafter that? The contract, in  
17 your view, is terminated by this notice on  
18 November 14th.

19 MR. TUCCI: No, the contract was  
20 terminated by the notice in August of 2002.  
21 The contract specifically provided that it  
22 could be terminated by either party. But some  
23 of the obligations survived termination. One  
24 of the obligations was WorldCom's obligation  
25 to continue paying residual commissions

1 conditioned upon HSG's continuing obligation  
2 not to solicit agents and customers. So there  
3 were -- the agreement itself had been  
4 terminated. There were some continuing  
5 obligations that required both parties to do  
6 certain things. Not to solicit by HSG and to  
7 make payments by MCI.

8 THE COURT: But on November 14, if  
9 WorldCom says that they're considering their  
10 remedies which would be, I'm giving you notice  
11 of a violation of the section that said you  
12 can't solicit WorldCom's customers. What is  
13 that supposed to mean to HSG? Does that mean  
14 that you're not going to get commissions  
15 anymore? And if it means you're not going to  
16 get commissions anymore, what were then the  
17 continuing obligations that HSG had?

18 MR. TUCCI: If they were not getting  
19 commissions anymore for subject to their  
20 rights in bankruptcy because they weren't  
21 getting paid commissions on a post-petition  
22 dollar for dollar basis. That's clear.  
23 Whether they had the opportunity to present a  
24 claim, I think they would have some continuing  
25 obligations to not solicit. But at that point

1       in time, if they're not getting paid or --  
2       take it outside the context of bankruptcy, if  
3       WorldCom breaches and doesn't pay, they have  
4       no obligation to not solicit any longer.

5             THE COURT: All right, thank you.

6             MR. TUCCI: Thank you.

7             MR. FISHER: Thank you.

8             THE COURT: All right.

9             MR. FISHER: Your Honor, I'm sorry.

10          Just before we wrap up, as part of our  
11       opposition to the motion, we also ask that  
12       today's oral argument be treated as a pre-  
13       motion discovery conference. And in  
14       particular, all I seek is the Court's  
15       permission to bring a motion to compel the  
16       depositions and the documents that I highlight  
17       in my 56(f) declaration as being essential and  
18       that have not been provided to date.

19             THE COURT: Well, that may be a bit  
20       premature. I mean, I -- let me determine what  
21       direction I'm going in first before I rule on  
22       that. All right. Chambers will contact you.  
23       If you haven't heard from chambers in 30 days  
24       I could set up a conference call with  
25       chambers.

1 MR. FISHER: Thank you, Your Honor.

2 MR. TUCCI: Thank you.

3 THE COURT: All right, thank you.

4 (Proceedings concluded at 12:00 P.M.)

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2 C E R T I F I C A T I O N

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I, Esther Accardi, hereby certify that  
the foregoing is a true and correct  
transcription, to the best of my ability, of  
the sound recorded proceedings submitted for  
transcription in the matter of:  
WorldCom, Inc., et al.

9

10 I further certify that I am not employed  
11 by nor related to any party to this action.

12

13 In witness whereof, I hereby sign this  
14 date:

15 May 9, 2006

16

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Esther Accardi

18 Esther Accardi

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